



IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 812.

AMERICAN STORES, INC., *Petitioner*,

v.

CHESTER BOWLES, ADMINISTRATOR OF THE OFFICE OF PRICE
ADMINISTRATION.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia.**

REPLY BRIEF FOR PETITIONER.

1. The respondent has gone *dehors* the record in an attempt to show that about a week prior to the purchase, which is the subject matter of this suit, the plaintiff had purchased the identical article in the same store and pointed out to the manager that the can was marked 14¢ instead of 10¢ (Respondent's Brief, p. 12). While there was some testimony by the plaintiff that she had made such a pur-

chase, she did not testify that she had pointed out any error to the manager. On the contrary, she admitted that she did not recognize or know the manager.

2. Again, *dehors* the record, the respondent states that the evidence at the trial showed that on the occasion of the first purchase, "plaintiff warned an employee that the cans of New and Old Style Soup were co-mingled on the shelf and advised that these cans should be segregated to avoid confusion and to aid in proper observance of price ceilings" (Respondent's Brief, p. 12). This is a considerable elaboration of what plaintiff actually said. Her evidence on this point was simply that about a week before the sale in question, she made some sort of statement to an unidentified clerk at a cash register that the particular type of soup was incorrectly marked.

3. The respondent, prior to submitting his brief, requested petitioner to enter into a stipulation of his version of the above matters as set forth in his brief. The petitioner refused because (1) it disputes the truth of the plaintiff's testimony on the matters involved, (2) the Trial Court did not find for the plaintiff on the issues presented by this testimony, and (3) as pointed out, the respondent's version is materially erroneous. Nevertheless, the respondent inserted his version of these matters, not of record, into his brief.

4. The respondent's purpose in stating this alleged evidence was to meet the petitioner's contention that Section 205(e) is inapplicable where the purchaser has failed to call an overcharge, not otherwise shown to be wilful, to the attention of the seller in order to give him an opportunity to correct any mistake (Respondent's Brief, pp. 11-13). The record in this case does not show that the petitioner's attention was ever called to an overcharge by the plaintiff. While, as before noted, the plaintiff did testify vaguely of having made some complaint the week before, her testimony was unreliable and was disregarded by the Trial Court and

by the respondent, and is not a matter of record. The respondent says that the petitioner is not entitled to secure a ruling on its contention "in view of the state of the record", but this is hardly true unless the record includes the respondent's brief.

The record is complete and entirely adequate. It clearly shows that all the testimony was considered. The Municipal Court of Appeals found that the improper marking of the cans "resulted from an inadvertence of an employee. There was no evidence of an intent to violate the price ceiling regulations. It does not appear whether the plaintiff, having selected the can from a shelf properly marked, realized at the time that an overcharge was made by the cashier, or called attention to the error" (Opinion, Municipal Court of Appeals, R. 9). Implicit in these findings is the determination that there was no credible evidence of any overcharge having at any time been called to the attention of the petitioner by the plaintiff.

5. Upon the version of the plaintiff's testimony set forth in the respondent's brief, it appears that she deliberately permitted herself to be overcharged, knowing that the petitioner had made an innocent error (Respondent's Brief, p. 12).

6. The respondent asserts as its reason for failing to include in the statement on appeal the disputed testimony of the plaintiff, which is not of record, that he did not believe that evidence bearing on the character of the "petitioner's admitted violation of the regulation" would be relevant to the issues on appeal (Respondent's Brief, p. 12).

In the first place, the petitioner has never "admitted" any violation of the regulation. An innocent overcharge was found as a fact by the Trial Court upon conflicting testimony.

In the second place, it was plain, or should have been plain, to all concerned at that time that the character of the alleged overcharge, that is, whether it was intentional or

not, or whether it was induced by the plaintiff, was an important issue in the case.

This clearly appears from the record and from the decision of the Municipal Court of Appeals (R. 3-5, 7). We respectfully suggest that the respondent is making a lame excuse for his failure to include in the record what he now thinks would be favorable to him.

7. The respondent refers to the petitioner's willingness to concede below the applicability of the Statute to unintentional violations (Respondent's Brief, p. 10), but as shown in the petition, at p. 6 (Note 3), no such concession was ever made.

8. The respondent is, in effect, attempting to re-open an issue of fact, upon which the decision of the Municipal Court of Appeals is predicated and which, until the filing of respondent's brief, has never been disputed. If this can be done, the petitioner would have the right to re-open in this Court the factual issue of whether the alleged overcharge had ever been made.

9. Finally in desperation, respondent has attempted to raise some doubt as to the constitutional power of this Court to review the decision of the Circuit Court of Appeals on *certiorari* (Respondent's Brief, pp. 8-9, Note 4). The plain answer to that suggestion is that it is well settled that "jurisdiction in the case of an intervention is determined by that of the main cause". See *St. Louis K. C. & C. R. Co. v. Wabash R. Co.*, 217 U. S. 247, 250. Moreover, the petitioner is certainly in the same position, with respect to the judgment, as if there had been no intervention.

Respectfully submitted,

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